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July 18, 2019

Please respond to: (650) 363-4647

Via E-mail & U.S. MAIL

MuckRock News
Dept MR 76595
411A Highland Ave.
Somerville, MA 02144-2516
76595-15862571@requests.muckrock.com

Re: Requests for records of peace officer dishonesty pursuant to CPRA and Penal Code § 832.7(b)(1)(C)

Dear Mr. Rubins and to whom it may also concern:

I am an attorney for the County of San Mateo and I represent the San Mateo County District Attorney's Office ("DAO") in civil matters, including responses to Public Records Act requests and requests made pursuant to California Penal Code section 832.7. I write on behalf of the DAO in response to your requests dated July 4, 2019 which the DAO received on July 8, 2019. A copy of the requests is enclosed for your convenience.

From my reading, you have made two very different requests upon the DAO to produce certain records pursuant to both California Public Records Act and Penal Code § 832.7. Your first request has to do with "Brady lists, Giglio lists, potential impeachment disclosure lists, or any similar compiled records or lists of records of the type set forth in California Penal Code § 832.7(b)(1)(C)." Your second request is specific to Penal Code § 832.7(b)(1)(C): "Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or

custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.” I will respond to each separately.

1. DAO’s Response to Your First Request – *Brady* lists, *Giglio* lists, potential impeachment disclosure lists:

Your request for “*Brady* lists, *Giglio* lists, potential impeachment disclosure lists” are, strictly speaking, not subject to the disclosure requirements of Penal Code § 832.7(b)(1)(C) because such lists, if any exist at all, do not necessarily involve a “sustained finding” of peace officer dishonesty “directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.”

Moreover, in our view, this request is also exempt from disclosure under the California Public Records Act based on the following provisions:

- Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. (Govt. Code sec. 6254(f); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061; *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169.) Even if the DAO had any such *Brady*, *Giglio* and/or impeachment lists, such lists would constitute files compiled by a local agency for law enforcement purposes and therefore exempt from disclosure.
- Communications with investigating agency protected by the official information privilege. (Gov’t C. §§ 6254(k); 6276.32; Evid. C. § 1040.)
- Information protected by right to privacy. (Gov’t C. §§ 6254(k); 6255; Cal. Const., art. I, sec. 1; *Central Valley Ch. 7th Step Foundation, Inc. v. Younger* (1989) 214 Cal.App.3d 145, 161-162; *Younger v. Berkeley City Council* (1975) 45 Cal.App.3d 825, 832.)
- Personnel or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. (Gov. Code, §§ 6254(c), 6254(f), 6255; Cal. Const., art. I, § 1; *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526; *Johnson v. Winter* (1982) 127 Cal.App.3d 435.)

- Peace officer personnel records. (Gov. Code, §§ 6254(c), 6254(k); 6276.34; Evid. Code, §§ 1043, 1045; Penal Code, § 832.7(a); Association for *Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413 (petition for review pending.)
- The public interest in not disclosing the requested records outweighs the public interest in disclosure. (Gov. Code, § 6255.)
- Records and/or data that constitute attorney-client privilege/attorney work-product. (Govt. Code § 6254(k); Evid. Code § 950, et seq.; Code of Civ. Proc. § 2018.030; *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414.)
- Records containing the County's or a County department's deliberative process or decision-making process, the disclosure of which would inhibit frank and open discussion among County agents. (Govt. Code sec. 6255; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.) The public interest in withholding these records clearly outweighs the public interest in disclosure, in light of the public's interest in the County maintaining the privacy of records pertaining to pending agency action and/or encouraging the candid discussion of legal or policy matters amongst County officials.

After a reasonable search of its records during the past ten years as requested, and based on the foregoing, the DAO does not have any records to disclose that it knows for a fact are "relat[ed] to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime" including but not limited to any alleged *Brady* Lists, *Giglio* lists, or potential impeachment disclosure lists as requested.

2. DAO's Response to Your Second Request – Penal Code § 832.7(b)(1)(C):

Penal Code § 832.7(b)(1)(C) states: "Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime. or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence." The highlighted portion is significant to the DAO's response. Despite the fact that the DAO conducts some investigations related to officer conduct, including some instances of dishonesty by a peace or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, it is highly uncommon for the DAO to possess, or for its records to indicate whether that conduct resulted in a "sustained finding" of misconduct within the meaning of Penal Code § 832.7. Indeed, "as used in Section 832.7, a 'sustained' finding means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections

3304 and 3304.5 of the California Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy.” (Penal C. § 832.8.)

This definition clearly refers to the final determination made under the employing agency’s adjudicative process, following their investigation and an opportunity for the officer to pursue an administrative appeal. To be clear, the DAO does not make any “sustained findings” nor does it issue “final determinations” of peace officer dishonesty; that is within the exclusive province of the employing agency. Thus, if the DAO receives a request for any records that relate to a “sustained finding” of dishonesty – such as yours – the DAO can only provide such records if a copy or actual notice of any such “sustained finding” exists in its files from the appropriate agency. After a reasonable search of its records spanning the past ten years as you requested, the DAO does not have any records to disclose that it knows for a fact are “relat[ed] to an incident in which a sustained finding was made by any law enforcement or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime.”

Additionally, Penal Code § 832.7 explicitly states that “[t]his section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney’s office, or the Attorney General’s office.” (Penal C. § 832.7(a).)

For these several reasons, the DAO is unable to disclose any records responsive to your second request. In this regard, the DAO suggests that MuckRock News might have better success if the same requests were to be served directly on the peace officer’s employing agency since they are responsible for making any such “sustained findings” and/or “final determinations.”

Should you have any questions or wish to discuss this matter further, I invite you or your representative to contact me directly either by telephone or email at your convenience.

Sincerely,

JOHN C. BEIERS, COUNTY COUNSEL

By: 

Joseph F. Charles, Deputy County Counsel

cc: Albert Serrato, via email

Enclosure: MuckRock News July 4, 2019 letter re CPRA Request

San Mateo County District Attorney, Redwood City
PRA Office
400 County Center, 3rd Floor
Redwood City, CA 94063

July 4, 2019

To Whom It May Concern:

Pursuant to the California Public Records Act, I hereby request the following records:

In accordance with California Penal Code §832.7 (b)(1), as amended by SB 1421, I am requesting all "Brady lists," "Giglio lists," "potential impeachment disclosure lists," or any similar compiled records or lists of records of the type set forth in California Penal Code §832.7 (b)(1)(C). That is, "Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence."

In particular, the records I am seeking would provide a list of law enforcement officers in your jurisdiction whose involvement in a criminal proceeding would have to be disclosed as potentially exculpatory evidence in accordance with Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 450 U.S. 150 (1972). I am making this request for both sworn employees and non-sworn employees. At a minimum, please include the full name, serial number, and agency of employment; separate lists for each agency in your jurisdiction are fine. If possible, please also include the date of inclusion on the list and any descriptive information relating to the reason for inclusion on the list. If redactions are made, please be sure to justify how the redaction "clearly outweighs" the public interest of disclosure per Government Code §6255.

The time limit of this request is the previous 10 years, or to the maximum extent possible under your agency's records retention schedule if less than 10 years. To be clear, while SB 1421 went into effect on January 1, 2019, in accordance with the recent appellate decision in Walnut Creek Police Officers' Association v. City of Walnut Creek et al. which unsuccessfully challenged retroactivity, your agency is required by law to produce such records created prior to January 1, 2019 as well as those records created after the effective date.

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 10 calendar days, as the statute requires.

Sincerely,

Dan Rubins

Filed via MuckRock.com

E-mail (Preferred): 76595-15862571@requests.muckrock.com

For mailed responses, please address (see note):

MuckRock News

DEPT MR 76595

411A Highland Ave

Somerville, MA 02144-2516

PLEASE NOTE: This request is not filed by a MuckRock staff member, but is being sent through MuckRock by the above in order to better track, share, and manage public records requests. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as undeliverable.